

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAWN S. NEWTON,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

NO. CV-11-226-RHW

**ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT;
DENYING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

Before the Court are Plaintiff's Motion for Summary Judgment, ECF No. 19 and Defendant's Motion for Summary Judgment, ECF No. 26. The motions were heard without oral argument. Plaintiff is represented by Maureen J. Rosette. Defendant¹ is represented by Assistant United States Attorney Pamela DeRusha and Special Assistant United States Attorney Debra Meachum.

I. Jurisdiction

On April 22, 2008, Plaintiff Dawn S. Newton applied for Title II Disability Insurance Benefits (DIB) and Title XVII Supplemental Security Income (SSI)

¹Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C. § 405(g).

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1 benefits. Plaintiff alleges disability beginning March 15, 1998. Her application
2 was denied initially on May 27, 2008, and on reconsideration on October 29,
3 2008. After timely requesting a hearing, on October 1, 2009, Plaintiff appeared
4 before Administrative Law Judge (“ALJ”) R. J. Payne, in Spokane, Washington.
5 Plaintiff was represented by Dana Madsen. Dr. Anthony Francis, M.D., Dr. Marian
6 Martin, Ph.D., and Ms. Diane Kramer, vocational expert, also appeared and
7 testified.

8 ALJ Payne denied benefits, concluding that Plaintiff was capable of
9 performing past relevant work as a hospital unit clerk, and in the alternative, based
10 on Plaintiff’s age, education, work experience, and residual functional capacity
11 there were jobs in significant numbers in the national economy that she could
12 perform. Plaintiff filed a request for review by the Appeals Council, which was
13 denied on May 13, 2011. Plaintiff filed her complaint in the Eastern District of
14 Washington on June 9, 2011. The Court has jurisdiction pursuant to 42 U.S.C. §
15 405(g).

16 **II. Sequential Evaluation Process**

17 The Social Security Act defines disability as the “inability to engage in any
18 substantial gainful activity by reason of any medically determinable physical or
19 mental impairment which can be expected to result in death or which has lasted or
20 can be expected to last for a continuous period of not less than twelve months.”
21 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be
22 under a disability only if his impairments are of such severity that the claimant is
23 not only unable to do his previous work, but cannot, considering claimant's age,
24 education and work experiences, engage in any other substantial gainful work
25 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

26 The Commissioner has established a five-step sequential evaluation process
27 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a)(4),
28 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

1 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.
2 §§ 404.1520(b), 416.920(b). Substantial gainful activity is work done for pay and
3 requires compensation above the statutory minimum. 20 C.F.R. §§ 404.1574,
4 416.972; *Keyes v. Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is
5 engaged in substantial activity, benefits are denied. 20 C.F.R. §§ 404.1571,
6 416.920(b). If he is not, the ALJ proceeds to step two.

7 Step 2: Does the claimant have a medically-severe impairment or
8 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the
9 claimant does not have a severe impairment or combination of impairments, the
10 disability claim is denied. A severe impairment is one that lasted or must be
11 expected to last for at least 12 months and must be proven through objective
12 medical evidence. 20 C.F.R. §§ 404.1508-09, 416.908-09. If the impairment is
13 severe, the evaluation proceeds to the third step.

14 Step 3: Does the claimant's impairment meet or equal one of the listed
15 impairments acknowledged by the Commissioner to be so severe as to preclude
16 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R.
17 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed
18 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the
19 impairment is not one conclusively presumed to be disabling, the evaluation
20 proceeds to the fourth step.

21 Step 4: Does the impairment prevent the claimant from performing work he
22 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant
23 is able to perform his previous work, he is not disabled. *Id.* If the claimant cannot
24 perform this work, proceed to the fifth and final step.

25 Step 5: Is the claimant able to perform other work in the national economy
26 in view of his age, education, and work experience? 20 C.F.R. §§ 404.1520(f),
27 416.920(f).

28 The initial burden of proof rests upon the claimant to establish a prima facie

1 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098
2 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or
3 mental impairment prevents him from engaging in his previous occupation. *Id.* At
4 step five, the burden shifts to the Commissioner to show that the claimant can
5 perform other substantial gainful activity. *Id.*

6 **III. Standard of Review**

7 The Commissioner's determination will be set aside only when the ALJ's
8 findings are based on legal error or are not supported by substantial evidence in
9 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)
10 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"
11 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."
12 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial
13 evidence is "such relevant evidence as a reasonable mind might accept as adequate
14 to support a conclusion." *Perales*, 402 U.S. at 401. The Court must uphold the
15 ALJ's denial of benefits if the evidence is susceptible to more than one rational
16 interpretation, one of which supports the decision of the administrative law judge.
17 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the evidence can
18 support either outcome, the court may not substitute its judgment for that of the
19 ALJ." *Matney*, 981 F.2d at 1019.

20 A decision supported by substantial evidence will be set aside if the proper
21 legal standards were not applied in weighing the evidence and making the
22 decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th
23 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are
24 immaterial to the ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec.*
25 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

26 **IV. Statement of Facts**

27 The facts have been presented in the administrative transcript and the ALJ's
28 decision, and will only be summarized here.

1 Plaintiff last worked in 1997 as a massage therapist. She also worked as a
2 hospital health unit coordinator. At the time of the hearing, she was 53 years old.
3 She is single, has one grown child, and has a high school diploma and a one-year
4 nursing degree. She currently lives with her mother.

5 Plaintiff testified she cannot work because of her lower back pain. She
6 states she lays down for most of the day, she can sit for 5-10 minutes before she
7 has to move, and can stand for about 40 minutes. She has difficulty walking and
8 cannot lift more than 5 lbs. She reported she does not do any housework or chores,
9 other than dishes. She engages in reading, yoga and meditation.

10 **V. The ALJ's findings**

11 The ALJ found that Plaintiff met the insured status requirements through
12 December 31, 2003, and she had not engaged in substantial gainful activity since
13 March 15, 1998, the alleged onset date. (Tr. 22.)

14 At step two, the ALJ found Plaintiff has the following severe impairments:
15 chronic low back pain. The ALJ found that Plaintiff's medically determinable
16 impairment of anxiety, pain disorder, and personality disorder were non-severe
17 because they do not cause more than minimal limitation in her ability to perform
18 basic mental work activities. (Tr. 23.) The ALJ also found the following physical
19 impairments as non-severe: left ankle stiffness, osteoporosis, hypertension, and
20 acute labrynthitis (dizziness).

21 At step three, the ALJ found Plaintiff does not have an impairment or
22 combination of impairments that meets or medically equals one of the listed
23 impairments in 20 C.F.R. Part 404, Subpart P. Specifically, the ALJ found that
24 Plaintiff's low back pain does not meet the medically equal listing requirements of
25 1.04, *Disorders of the Spine*.

26 The ALJ found Plaintiff has the following residual functional capacity:
27 can lift 20 pounds occasionally and frequently lift or carry 10 pounds;
28 sit for six hours and stand or walk for six hours in an eight-hour

1 workday; unlimited in ability to push or pull; occasionally climb
2 stairs or ramps, but no climbing ladders, crouch, or crawl; avoid
concentrated exposure to hazards such as machinery and heights.
(Tr. 25.)

3 The ALJ noted she has physical and mental symptomatology to include mild
4 to moderate frequent pain, for which Plaintiff takes medication. (Tr. 25.) Even so,
5 Plaintiff could remain reasonably attentive and responsive in a work setting and
6 would be able to carry out work assignments satisfactorily. (Tr. 25.)

7 At step four, the ALJ found Plaintiff is capable of performing past relevant
8 work as a hospital unit clerk, and in the alternative, after considering Plaintiff's
9 age, education, work experience, and residual functional capacity, there are other
10 jobs that exist in significant numbers in the national economy that Plaintiff can
11 perform, namely, mail clerk, survey worker, and cashier II. (Tr. 30-31.)

12 **VI. Issues for Review**

13 Plaintiff presents the following issues with respect to the ALJ's findings:

- 14 1. There is not substantial evidence to support the ALJ's conclusions.
- 15 2. The ALJ erred at step two in not finding that she has a severe mental
16 impairment.
- 17 3. The ALJ erred in relying on the testimony of a medical expert over the
18 opinions of treating and examining sources regarding her psychological
19 impairments.
- 20 4. The ALJ did not properly consider her testimony regarding her
21 symptoms and limitations from her impairments.

22 **VII. Discussion**

23 **1. Step Two - Severe Mental Impairment**

24 Plaintiff argues the ALJ erred in conducting the step two analysis when he
25 failed to find that Plaintiff had a severe mental impairment. Plaintiff maintains she
26 presented ample evidence consisting of signs, symptoms, and laboratory findings
27 providing the existence of a severe mental impairment.

1 In step two of the disability determination, an ALJ must determine whether
2 the claimant has a medically severe impairment or combination of impairments. In
3 making this determination, an ALJ is bound by 20 C.F.R. § 404.1520a. That
4 regulation requires those reviewing an application for disability to follow a special
5 psychiatric review technique. 20 C.F.R. § 404.1520a. Specifically, the reviewer
6 must determine whether an applicant has a medically determinable mental
7 impairment, *id.* § 404.1520a(b), rate the degree of functional limitation for four
8 functional areas, *id.* § 404.1520a(c), determine the severity of the mental
9 impairment (in part based on the degree of functional limitation), *id.* §
10 404.1520a(c)(1), and then, if the impairment is severe, proceed to step three of the
11 disability analysis to determine if the impairment meets or equals a specific listed
12 mental disorder, *id.* § 404.1520a(c)(2); *see also Keyser v. Comm'r Soc. Sec.*
13 *Admin.*, 648 F.3d 721, 725 (9th Cir. 2011).

14 Here, the ALJ conducted the requisite psychiatric review. His conclusion
15 that Plaintiff's medically determinable mental impairments of anxiety, pain
16 disorder associated with both psychological factors and general medical
17 conditions, and personality disorder not otherwise specified do not cause more
18 than minimal effect on her ability to work is supported by substantial evidence.
19 The ALJ noted that Plaintiff had no limitations on her daily living, except those
20 created by her physical condition, Plaintiff reported no problems in the workplace,
21 no evidence of panic attacks, isolation, or social withdrawal, no reported problems
22 with concentration, persistence or pace, and no episodes of decompensation.
23 Plaintiff is not taking any medication for any mental impairment; instead it was
24 prescribed for sleep. Plaintiff has normal mental status examinations and she has
25 not sought treatment for any mental health impairment since 1986. In the past,
26 Plaintiff was a world traveler. And, as set forth below, the ALJ properly gave little
27 weight to the DSHS evaluations.

28 The ALJ did not err in concluding that Plaintiff did not have a severe mental

1 impairment.

2 **2. Medical Testimony**

3 Plaintiff argues the ALJ failed to set forth the requisite specific and
4 legitimate reasons supported by substantial evidence in the record for rejecting the
5 opinions of Dr. Mabee and Dr. Greene. The ALJ gave limited weight to Dr. Mabee
6 and Greene's opinions. (Tr. 23.)

7 Both doctors evaluated Plaintiff based on a referral by the Department of
8 Social and Health Services to determine if there is sufficient psychological
9 impairment to prevent her from work. (Tr. 238, 344.) They found she had several
10 moderate work-related limitations. Specifically, these evaluators concluded that
11 Plaintiff would have moderate limitations with regard to her ability to perform
12 routine tasks, relate appropriately to coworkers and supervisors, interact
13 appropriately in public contacts, respond appropriately to and tolerate the
14 pressures and expectations of a normal work setting, care for self, including
15 personal hygiene and appearance, and control physical or motor movements and
16 maintain appropriate behavior. (Tr. 245, 342, 394). Plaintiff asks the Court to
17 credit these opinions and determine that her mental impairment caused more than
18 slight abnormalities on her ability to work. Plaintiff also argues the ALJ erred in
19 using Dr. Martin's testimony to reject Dr. Mabee and Dr. Greene's opinions.

20 Generally, more weight will be given to the opinion of a source who has
21 examined the claimant than to the opinion of a source who has not examined the
22 claim. 20 C.F.R. § 404.1527(c)(2)(1); *see Lester v. Chater*, 81 F.3d 821, 830 (9th
23 Cir. 1995) ("The opinion of an examining physician is, in turn, entitled to greater
24 weight than the opinion of a nonexamining physician."). The more a medical
25 source presents relevant evidence to support an opinion, greater weight will be
26 given that opinion, and the more consistent an opinion is with the record as a
27 whole, greater weight will be given that opinion. § 404.1527(c)(3),(4).

28 The opinion of an examining doctor, even if contradicted by another doctor,

1 can only be rejected for specific and legitimate reasons that are supported by
2 substantial evidence in the record. *Lester*, 81 F.3d at 831. The Ninth Circuit has
3 instructed that “the report of a non-treating, non-examining physician, combined
4 with the ALJ’s own observance of the claimant’s demeanor at the hearing did not
5 constitute substantial evidence to support rejecting the examining physician’s
6 opinion.” *Id.*

7 Here, the ALJ provided specific and legitimate reasons for rejecting Dr.
8 Mabee’s and Greene’s opinions and there is ample evidence to support the ALJ’s
9 rejection of Dr. Mabee’s and Dr. Greene’s opinions. Dr. Mabee’s and Dr. Greene’s
10 opinions are not consistent with the record as a whole. As the ALJ noted, during
11 the first evaluation, Plaintiff denied having any psychological issues, scored in the
12 mild range on the depression and anxiety inventories, and had a normal mental
13 status examination. A year later, Plaintiff scored in the moderate range with
14 respect to depression and anxiety, but the remainder of the examination was
15 unchanged. The ALJ noted that Plaintiff has not sought treatment for mental
16 health since 1986. Plaintiff reported no problems in the workplace, and there is no
17 evidence in the record of panic attacks, isolation, or social withdrawal. She did
18 not report any problems with her daily living activities, except those caused by her
19 physical condition. There was no indication in the record that Plaintiff had
20 problems with concentration, persistence or pace and she had normal scores on the
21 Trial Making A and B tests. Plaintiff arrived for her appointments on time and was
22 clean and well-dressed. Her eye contact, speech content, speech fluency and affect
23 were within normal limits. Dr. Martin testified he believed the scores and
24 conclusions were incorrect because the evaluators focused on Plaintiff’s pain
25 complaints in forming their conclusions.

26 The ALJ did not err in relying giving the DSHS evaluators little weight. The
27 moderate limitations set forth in the evaluators reports are not consistent with the
28 record as a whole.

3. ALJ's Credibility Finding

Plaintiff asserts the ALJ failed to state why he did not find Plaintiff credible and what facts in the record led him to that conclusion.

Here, the ALJ properly engaged in the two step process to evaluate Plaintiff's testimony regarding subjective pain.² He found that while Plaintiff's medically determinable impairment could reasonably be expected to cause some of the alleged symptoms, Plaintiff's statements concerning the intensity, persistence and limiting effects of the symptoms were not credible to the extent they were inconsistent with the ALJ's residual functional capacity assessment (Tr. 13).

An ALJ's assessment of a claimant's credibility is entitled to "great weight." *Anderson v. Sullivan*, 914 F.2d 1121, 1124 (9th Cir. 1990). When there is no evidence of malingering, the ALJ must give "specific, clear and convincing reasons" for rejecting a claimant's subjective symptom testimony. *Molina v. Astrue*, 674 F.3d 1104, 1112 (9th Cir. 2012) (citation omitted); *accord Taylor v. Comm'r of Soc. Sec. Admin.*, 659 F.3d 1228, 1234 (9th Cir. 2011) (*citing*

²In order to find a claimant's testimony regarding severity of his impairments unreliable, the ALJ must make "a credibility determination with findings sufficiently specific to permit the court to conclude that the ALJ did not arbitrarily discredit claimant's testimony." *Tommasetti v. Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). (citation omitted). In doing so, the Court engages in a two-step analysis. First, the ALJ must determine whether the claimant has presented objective medical evidence of an underlying impairment 'which could reasonably be expected to produce the pain or other symptoms alleged.'" *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007). Once a "claimant meets this first test, and there is not evidence of malingering, the ALJ can reject the claimant's testimony about the severity of her symptoms only by offering clear and convincing reasons for doing so." *Id.*

1 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)).³ If the ALJ's
 2 credibility finding is supported by substantial evidence in the record, the
 3 reviewing court "may not engage in second-guessing." *Thomas v. Barnhart*, 278
 4 F.3d 947, 959 (9th Cir. 2002).

5 In recognition of the fact that an individual's symptoms can sometimes
 6 suggest a greater level of severity of impairment than can be shown by the
 7 objective medical evidence alone, 20 CFR 404.1529(c) and 416.929(c) describe
 8 the kinds of evidence, including the factors below, that the ALJ must consider in
 9 addition to the objective medical evidence when assessing the credibility of an
 10 individual's statements:

- 11 1. The individual's daily activities;
- 12 2. The location, duration, frequency, and intensity of the individual's pain or
- 13 other symptoms;
- 14 3. Factors that precipitate and aggravate the symptoms;

16 ³Defendant argues the Court need only determine whether the ALJ properly
 17 made "specific," cogent findings, supported in the record, for rejecting a
 18 claimant's subjective symptom testimony, rather than "clear and convincing
 19 evidence." Indeed, some cases have held that, at a minimum, an ALJ must make
 20 specific, cogent findings, supported in the record, to reject a claimant's subjective
 21 symptom testimony. *See, e.g., Berry v. Astrue*, 622 F.3d 1228, 1234 (9th Cir.
 22 2010); *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990); *see also* Social
 23 Security Ruling. ("SSR") 96-7p ("When evaluating the credibility of an
 24 individual's statements, the adjudicator must consider the entire case record and
 25 give specific reasons for the weight given to the individual's statements"). The
 26 majority of cases apply the clear and convincing standard. Out of an abundance of
 27 caution, this Court shall apply the arguably more rigorous "clear and convincing"
 28 standard.

1 4. The type, dosage, effectiveness, and side effects of any medication the
2 individual takes or has taken to alleviate pain or other symptoms;

3 5. Treatment, other than medication, the individual receives or has received
4 for relief of pain or other symptoms;

5 6. Any measures other than treatment the individual uses or has used to
6 relieve pain or other symptoms (e.g., lying flat on his or her back, standing
7 for 15 to 20 minutes every hour, or sleeping on a board); and

8 7. Any other factors concerning the individual's functional limitations and
9 restrictions due to pain or other symptoms.

10 SSR 96-7P, 1996 WL 374186.

11 Here, the ALJ did not commit legal error in his consideration of Plaintiff's
12 testimony and did not err in not crediting Plaintiff's reports of her limitations
13 caused by her impairments. Moreover, the ALJ provided specific findings and
14 stated clear and convincing reasons in finding Plaintiff's testimony regarding her
15 limitations not credible. The ALJ reviewed the medical evidence and concluded it
16 did not support Plaintiff's subjective complaints. Although Plaintiff states she
17 injured her back in 1979, there is no medical evidence prior to 2008. Malingering
18 was noted in March 6, 2009. She was discharged from a pain management
19 program in January, 2009. The ALJ noted that Plaintiff testified she can only sit
20 for 5 minutes, yet examination notes indicate that Plaintiff was able to sit
21 attentively through examinations, and Plaintiff stated she was able to sit through
22 movies. Similarly, she testified she had trouble walking, yet treatment notes gave
23 no indication of any problems with ambulation. More importantly, Plaintiff
24 indicated that her present impairment (back pain) was approximately the same
25 level of severity for approximately 30 years, yet she was able to work for a
26 significant amount of years during that time. Also, the case records show that
27 Plaintiff's activities of daily living are not as limited as she alleged at the hearing.
28 She has no problems with self-care, no problems with daily household chores,

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1 grocery shopping, and preparing simple meals. She takes care of her grandsons
2 every other weekend. Finally, Plaintiff has spent a significant amount of time in
3 the last thirty years traveling the world, and performing community service-type
4 work.

5 The ALJ did not err in evaluating Plaintiff's credibility regarding her reports
6 of her limitations caused by her impairments.

7 **4. Substantial Evidence**

8 Substantial evidence supports the ALJ's decision. Dr. Francis, Dr Bagby,
9 and the State reviewing consultants concluded that Plaintiff is capable of light
10 exertion work. Richard Hedrick, Plaintiff's physician assistant, concluded that
11 Plaintiff was capable of light work. There is relatively weak medical evidence
12 supporting Plaintiff's physical complaints and the record indicates that Plaintiff
13 may have been malingering. Moreover, Plaintiff chooses to not follow the
14 prescribed treatments.

15 **VIII. Conclusion**

16 Plaintiff has not met her burden of showing the ALJ committed legal error,
17 or that his conclusion that Plaintiff was not disabled from March 1998 to October
18 15, 2009, was not supported by substantial evidence. The ALJ properly found that
19 Plaintiff was capable of performing past relevant work as a hospital unit clerk and
20 therefore, she is not disabled.

21 Accordingly, **IT IS HEREBY ORDERED:**

22 1. Plaintiff's Motion for Summary Judgment, ECF 19, is **DENIED**.

23 2. Defendant's Motion for Summary Judgment, ECF No. 26,
24 is **GRANTED**.

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IT IS SO ORDERED. The District Court Executive is hereby directed to file this Order, provide copies to counsel, and **close the file**.

DATED this 23rd day of July, 2013.

ROBERT H. WHALEY
United States District Judge

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